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UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF CALIFORNIA

## I. INTRODUCTION

Defendant Casual Dining Services, Inc. dba Pizzeria Uno (hereinafter “Pizzeria Uno”) has filed a motion to dismiss plaintiff Barbara Hubbard’s state claims. To support its argument, defendant relies on a recent decision from a state appellate court, in the case of *Gunther v. Lin*,

***Hubbard v. C.V. Center, Inc., et al., Case No. 08cv041 JAH (LSP)***  
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1 for the bulk of its argument that the law is unsettled on damages and intent,  
 2 as they pertain to Hubbard's state Unruh Act claim.

3 The issues presented by Hubbard's state claims are neither novel nor  
 4 complex, as a multitude of federal judges within California have repeatedly  
 5 found in cases with similar facts. Additionally, defendant's reliance on  
 6 *Gunther* is misplaced; it is a misreading and misinterpretation of both the  
 7 plain language of the statutes at issue, and it plainly contradicts not only  
 8 California Supreme Court precedent, but Ninth Circuit precedent as well,  
 9 which this Court is bound by. It is, in short, an anomaly.

10 **II. DISCUSSION**

11 Plaintiff will present her arguments – and analysis in light of the  
 12 *Gunther* decision – from three (3) different perspectives: 1) equity; 2)  
 13 factual differences of the instant matter with the *Gunther* case; and, finally,  
 14 3) the legal arguments concerning *Gunther*.

15 **A. Equity: Hubbard Has Pled Intent in Her Complaint and Has a**  
 16 **Right to Prove Up Such Intent**

17 Pizzeria Uno argues that the recent case of *Gunther v. Lin*, 144  
 18 Cal.App.4<sup>th</sup> 223 (4<sup>th</sup> Dist. 2006), has changed the landscape of Unruh Act  
 19 claims. Defendant argues that since *Gunther* requires intent in order to  
 20 obtain statutory damages under the Unruh Act, and as such holding directly  
 21 conflicts with the Ninth Circuit's opposition holding in *Lentini v. Calif.*  
 22 *Cntr. For the Arts, Escondido*, 370 F.3d 837 (9<sup>th</sup> Cir. 2004), the conflict  
 23 between *Gunther* and *Lentini* (and between other district courts) requires  
 24 this Court to decline supplemental jurisdiction over Hubbard's state claims.  
 25 See Defendant Casual Dining Service's Memorandum of Points and  
 26 Authorities In Support of Motion to Dismiss (hereinafter "Defendant's  
 27 Motion"), pp. 3-5.

28 However, this conflict centers around the issue of *intent*, and on this  
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1 topic (quite apart from the misguided decision in *Gunther*, as discussed  
 2 *infra*) this Court need not make any decision regarding the state claims at  
 3 this early stage of the litigation.

4       This is so because Hubbard has actually pled intent in her Complaint  
 5 with respect to defendant Pizzeria Uno (see Complaint, Docket Item #1, ¶¶  
 6 49-50), and basic notions of equity mean that Hubbard deserves a chance  
 7 to prove that defendant intended to discriminate against disabled persons.  
 8 As defendant rightly points out, the Ninth Circuit has recently certified the  
 9 question of what exactly is meant by “intent” in the *Gunther* decision to  
 10 the California Supreme Court. *See Munson v. Del Taco, Inc.*, 522 F.3d 997  
 11 (9<sup>th</sup> Cir. 2008). Specifically, the Ninth Circuit certified two questions:

- 12       • Must a plaintiff who seeks damages under California Civil Code  
 13           section 52, pursuant to a violation of section 51, prove “intentional  
 14           discrimination”?; and
- 15       • If the answer to the above is “yes,” what does intentional  
 16           discrimination” mean in this context?

17 *Id.* at 999. For example, if the California Supreme Court affirms that  
 18 “intentional discrimination” must be shown, is it an actual discriminatory  
 19 animus towards the disabled, or would deliberate indifference to the needs  
 20 of the disabled suffice? Or perhaps the intent to have a subject property in  
 21 a specific design or layout – which results in access barriers – would  
 22 suffice.

23       At any rate, if the California Supreme Court accepts the Ninth  
 24 Circuit’s request, it will answer this conundrum. However, **whatever**  
 25 **answer it comes up with**, it is simply too early to dismiss the state claims  
 26 (nor is a stay of this action required) when Hubbard has not even had a  
 27 chance to show this Court that intent is present – regardless of whether it is  
 28 required or not. If the California Supreme Court agrees that *Gunther*  
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1 requires intent, then Hubbard has pled it, and has the right to prove it up  
 2 (as defined in her Complaint, that is, that defendant intended the layout and  
 3 design of subject pizza parlor as it currently is, which is non-compliant),  
 4 regardless of *how* the California Supreme Court has defined said “intent.”  
 5 If the California Supreme Court disagrees with *Gunther* and rejects the  
 6 reasoning of *Gunther*, absolutely no harm is done by Hubbard pursing a  
 7 showing of intent to discriminate by Pizzeria Uno.

8 Either way, equity and the recent certification by the Ninth Circuit  
 9 requires that this Court not dismiss Hubbard’s state claims at this time.

10 **B. Factual: The *Gunther* Case Involved a Property Undergoing a**  
 11 **Re-Model, While the Current Lawsuit Does Not**

12 Another significant difference between the instant matter and the  
 13 *Gunther* case is that the defendant’s property in *Gunther* was undergoing a  
 14 re-model when the disabled plaintiff visited it, so the case became a matter  
 15 of what exactly defendant had *intended* in the re-model. For example, two  
 16 barriers at issue in *Gunther* were unwrapped plumbing in the bathroom, as  
 17 well as a mirror mounted too high. The *Gunther* Court came to the  
 18 conclusion – by examining defendant’s design plans and proffered  
 19 evidence – that defendant intended to wrap the plumbing (and plaintiff  
 20 merely encountered the plumbing during the re-model *before* it had been  
 21 wrapped and insulated as intended), and the hanging of the mirror was a  
 22 mistake: defendant had never intended to mount any mirror at all. *See*  
 23 *Gunther v. Lin*, 144 Cal.App.4<sup>th</sup> 223, 231-32 (4<sup>th</sup> Dist. 2006). So the  
 24 decision of the *Gunther* Court was directly related to *how* defendant  
 25 intended to re-model the subject property, and whether said final design  
 26 and layout presented access barriers and thereby violated the ADA and/or  
 27 Unruh Act.

28 However, in the instant matter, there is no re-model going on. The  
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1 property is what it is – it exhibits the same layout and design it has had  
 2 since the enactment of the ADA and state access laws. And, since no re-  
 3 model was or is underway, there is no question or confusion regarding *how*  
 4 Pizzeria Uno intended the design and layout of the pizza restaurant to be:  
 5 its current layout and design is **exactly** how defendant intends it to be. The  
 6 question then becomes: does the design or layout of the restaurant present  
 7 access barriers and therefore violate the ADA and/or Unruh Act and other  
 8 pled state law claims?

9 **C. Legal: Gunther Misinterpreted the Current Law, and the Ninth**  
 10 **Circuit Has Stated That it Believes There is Strong Evidence**  
 11 **That the California Supreme Court Will Reject Gunther's**  
 12 **Reasoning**

13 **1. *Preliminary Matters: Intent***

14 Pizzeria Uno argues that the recent case of *Gunther v. Lin*, 144  
 15 Cal.App.4<sup>th</sup> 223 (4<sup>th</sup> Dist. 2006), has changed the landscape of Unruh Act  
 16 claims. Defendant argues that since *Gunther* requires intent in order to  
 17 obtain statutory damages under the Unruh Act, and as such holding directly  
 18 conflicts with the Ninth Circuit's opposition holding in *Lentini v. Calif.*  
 19 *Cntr. For the Arts, Escondido*, 370 F.3d 837 (9<sup>th</sup> Cir. 2004), this Court is  
 20 obligated to adhere to *Gunther*.

21 There are several problems with this argument.

22 **a. *The Disabled Persons Act***

23 First, Hubbard points out that she has also alleged violations of  
 24 California's Disabled Persons Act ("CDPA") against Pizzeria Uno. *See*  
 25 Complaint, ¶¶ 157-163. As with the Unruh Act, a violation under the  
 26 ADA also constitutes a violation of the California DPA. Cal. Civ.Code §  
 27 54.1(d). However, a showing of intent to discriminate is **not required** to  
 28 obtain monetary damages under the CDPA. *Donald v. Cafe Royale, Inc.*,  
*Hubbard v. C.V. Center, Inc., et al.*, Case No. 08cv041 JAH (LSP)

1 218 Cal.App.3d 168, 177-180, 266 Cal.Rptr. 804 (1990).

2 Pizzeria Uno has utterly failed to address this issue in its motion.  
 3 This is significant. If this Court should decide that due to the federal and  
 4 state tension on the issue of intent and the Unruh Act it must decline  
 5 supplemental jurisdiction on Hubbard's Unruh Act claim, Hubbard can still  
 6 proceed on her claim under the CDPA for damages without the need of  
 7 showing intentional discrimination of any kind whatsoever.

8 *b. The Ninth Circuit Has Certified the Question of Intent  
 9 and Gunther to the California Supreme Court*

10 The Ninth Circuit has repeatedly made it clear that federal courts  
 11 must defer to state appellate court decisions on state law (if it conflicts  
 12 with federal law) **unless** there is evidence that the state supreme court  
 13 would decide differently than the appellate court. *See, e.g., Ryman v. Sears,*  
 14 *Roebuck and Co.*, 505 F.3d 993, 995 (9<sup>th</sup> Cir. 2007). In the instant case,  
 15 however, there is in fact evidence to think that the California Supreme  
 16 Court would decide the issue differently than the Gunther appellate court.

17 First, this Court is in fact bound by circuit authority, and in this case,  
 18 it is bound by the case of *Lentini v. Calif. Cntr. For the Arts*, 270 F.3d 837,  
 19 847 (9<sup>th</sup> Cir. 2004), which held that because a disabled plaintiff need not  
 20 prove discriminatory intent under the ADA, plaintiffs also need not prove  
 21 discriminatory intent under the Unruh Act, since the California legislature  
 22 amended the Act to incorporate the ADA standards of liability. *See also*  
 23 *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir.2001) ("A district court  
 24 bound by circuit authority ... has no choice but to follow it, even if  
 25 convinced that such authority was wrongly decided").

26 Second, as previously discussed, the Ninth Circuit has recently  
 27 certified the issue of *Gunther* and intent to the California Supreme Court in  
 28 order to resolve conflict between *Gunther* and *Lentini*. *See Munson v. Del*  
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1 *Taco, Inc.*, 522 F.3d 997 (9<sup>th</sup> Cir. 2008).

2 Most significantly, the Ninth Circuit made it exceedingly clear that it  
 3 thinks the reasoning of the *Gunther* appellate court was faulty and contrary  
 4 to previous California Supreme Court rulings. The Ninth Circuit presented  
 5 abundant evidence of this in its certification order, *see Munson*, at 1002-  
 6 1003, before unequivocally stating: “The foregoing concerns about  
 7 *Gunther's* reasoning leave us in doubt as to whether the California  
 8 Supreme Court would hold in conformity with it.” *Id.*

9 Thus, in the Ninth Circuit’s view, there is in fact convincing  
 10 evidence that the California Supreme Court would decide the issue  
 11 differently than the *Gunther* appellate court. Because of this, and as a  
 12 direct consequence of previous Ninth Circuit authority, this Court is  
 13 obligated to disregard the appellate court decision of *Gunther v. Lin*, and  
 14 apply *Lentini* in the instant matter. *See also Wilson v. Haria and Gogri*  
 15 *Corp.*, 479 F.Supp.2d 1127, 1136 (E.D.Cal.2007) (finding that since a  
 16 statutory and legislative history analysis of the Unruh Act convincingly  
 17 shows that *Gunther* is not the law of the state, and federal courts are free to  
 18 disregard intermediate state court decisions where there is “convincing  
 19 evidence” that the state’s highest court would decide differently, *Lentini*  
 20 must be applied), *citing In re Watts*, 298 F.3d. 1077, 1083 (9<sup>th</sup> Cir. 2002).

21 In short, until the California Supreme Court states otherwise,  
 22 pursuant to *Lentini* there is no requirement that Hubbard demonstrate  
 23 intentional discrimination in order to prove a violation of the Unruh Act, so  
 24 long as she can show an ADA violation.

25 **2. A Brief Discussion of Why *Gunther* Got the Law Wrong**

26 There are four published decisions that need to be harmonized to  
 27 understand the state of the law with respect to the Unruh Civil Rights Act.

28 Those cases are: *Harris v. Capital Growth Investors XIV*, (1991) 52 Cal.3d  
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1 1142, 278 Cal.Rptr. 614, 805 P.2d 873; *Koire v. Metro Car Wash* (1985)  
 2 40 Cal.3d 24, 707 P.2d 195, 219 Cal.Rptr. 133; *Modern Development Co.*  
 3 v. *Navigators, Ins. Co.* (2nd Dist. 2003) 111 Cal.App.4th 932, 4  
 4 Cal.Rptr.3d 528; and *Gunther v. Lin.*

5 The California Supreme Court has already ruled that there is no need  
 6 to establish discriminatory intent under the Unruh Civil Rights Act. *See*  
 7 *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 707 P.2d 195, 219  
 8 Cal.Rptr. 133. In *Koire*, the plaintiff was challenging the practice of a car  
 9 wash in providing for cheaper car washes for women on "ladies days" and,  
 10 therefore, discriminating against men on those days. The trial court found  
 11 "no intent" to exclude or to make men "feel unwelcome, unaccepted or  
 12 undesired." *Koire*, 40 Cal.3d at 33. But the California Supreme Court,  
 13 found a violation of the law and pointed out that: "**discriminatory intent is**  
 14 **not required by the Unruh Act . . .** Plaintiff was entitled to equal  
 15 treatment, no matter what his sex, and ***regardless of defendants' intent in***  
 16 ***denying him equal treatment.***" *Id.* (emphasis added, internal quotations  
 17 removed). There could not be a more clear statement of the law: **There is**  
 18 **no need to establish an intent to exclude.**

19 Given this clear statement of the law by the California Supreme  
 20 Court (and the Ninth Circuit in *Lentini*), one must then ask how we  
 21 harmonize the subsequent California Supreme Court holding in *Harris v.*  
 22 *Capital Growth Investors XIV* (1991) 52 Cal.3d 1142 (and upon which the  
 23 *Gunther* court so heavily relied, and by extension Pizzeria Uno in the  
 24 instant motion), that, "the language of the Act suggests that intentional acts  
 25 of discrimination, not disparate impact, was the object of the legislation" or  
 26 "the damages provision . . . reveals a desire to punish intentional and  
 27 morally offensive conduct," or, "we hold that a plaintiff seeking to  
 28 establish a case under the Unruh Act must plead and prove intentional

1 discrimination in public accommodations in violation of the terms of the  
 2 Act. A disparate impact analysis or test does not apply to Unruh Act  
 3 claims." *Id.* at 1172 and 1175.

4 A key to harmonizing the statement, "**discriminatory intent is not**  
 5 **required**" (*Koire*) with "**a plaintiff must prove intentional**  
 6 **discrimination**" (*Harris*), is a recent published decision: *Modern*  
 7 *Development Co. v. Navigators, Ins. Co.* (2nd Dist. 2003) 111 Cal.App.4th  
 8 932, 4 Cal.Rptr.3d 528. In *Modern Development*, the court was faced with  
 9 this very question: what is intentional conduct under the ADA and the  
 10 Unruh Civil Rights Act? The *Modern Development* court found that "as a  
 11 matter of law" the inaccessible restrooms were "intentional conduct" and  
 12 reasoned:

13 As argued by Navigators, Moreno's alleged injuries were  
 14 caused by the architectural configuration of the Swap Meet and  
 15 Modern Development's alleged failure to remove architectural  
 16 barriers, *not by an accident*. **The Swap Meet intended for the**  
**bathrooms to be configured as they were**. The result is that  
 17 the incident involving Mr. Moreno is not a covered event.

18 *Id.* at 943 (emphasis added). Thus, under *Modern Development*, a plaintiff  
 19 does not need to prove that the defendant harbored some sort of *animus*  
 20 towards the disabled. Instead, the intentional discrimination required  
 21 under the law (i.e. under *Harris*) is the intention to present the architectural  
layout as it exists (discriminatory or not). In *Modern Development*, the  
 22 court found that such intent was present based on the architectural  
 23 configuration of the Swap Meet. This finding jibes with both *Koire*  
 24 ("discriminatory intent [actual animus] is *not* required") and *Harris* ("a  
 25 plaintiff must prove intentional discrimination").

26 In fact, this logical reading and harmonization of *Harris* and *Koire*  
 27 fits the relevant statutory scheme perfectly. Under the Americans with  
 28

1      Disabilities Act, it is an act of discrimination to "fail to remove" certain  
 2      barriers. *See* 42 U.S.C. § 12182(b)(2)(A)(iv). The Unruh Civil Rights Act  
 3      has incorporated that provision and, therefore, the failure to remove certain  
 4      barriers is a violation of the Unruh Civil Rights Act. *See* Cal. Civ. § 51(f).  
 5      In light of the *Koire/Harris/Modern* trifecta, we should say that it is a  
 6      violation of the Unruh Civil Rights Act where there is an *intentional*  
 7      decision to not remove barriers, or, similarly, an intention to present the  
 8      architectural layout as it exists.

9           Moreover, this harmonization helps make sense of a poorly worded  
 10     *Gunther* decision. In *Gunther*, as discussed *supra*, because defendant Lin  
 11     had *intended* that there be wrapped plumbing and had *intended* that there  
 12     not be any mirror, the "violations" complained of by plaintiff Gunther were  
 13     *unintentional*. In other words, the "intentionality" addressed by the  
 14     *Gunther* court deals with whether the defendant intended its property to be  
 15     the way that it was — not that defendant Lin had to desire to exclude  
 16     persons with disabilities or treat them differently. In *Gunther*, the  
 17     defendant did NOT intend that there be a mirror and did NOT intend that  
 18     its plumbing be exposed and, therefore, the *Gunther* court found no  
 19     violation.

20           Hubbard urges this Court to reject the narrow interpretation urged by  
 21     Pizzeria Uno and interpret the law consistent with the published decisions,  
 22     as well as based on sound canons of statute construction, as explicated by  
 23     Senior Eastern District Court Judge Lawrence Karlton in *Wilson v. Haria*  
 24     & *Gogrich Corp.*, 479 F.Supp.2d 1127, 1137-41 (E.D.Cal.2007), a case  
 25     that even defendant admits has relevance in the instant analysis.

26           After all, it is in the spirit of interpreting the Act's coverage "in the  
 27     broadest sense reasonably possible," that the Honorable Judge Karlton  
 28     stated: "Furthermore, the court finds that the issue of state law presented  
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1 by the instant action is not particularly novel or complex in light of the  
2 overwhelming body of case law finding that proof of intent is not required  
3 [under the Unruh Act when an ADA violation is show].” *Wilson*, at 1138  
4 n.15. *Gunther* is an aberration, not the law, as even the Ninth Circuit  
5 makes clear in its recent *Munson* certification request.

6 **III. CONCLUSION**

7 For the foregoing, Hubbard respectfully requests that this Court  
8 continue to exercise supplemental jurisdiction over his state claims. There  
9 is no “conflict” regarding intent in this Circuit as illustrated by *Lentini*  
10 because *Gunther* is not the law; it is rather an incorrect interpretation of  
11 both existing state and federal law. It is an aberration in the face of an  
12 overwhelming body of cases that is contrary to its holding, a belief made  
13 especially clear by the *Munson* request for certification.

14 Furthermore, California’s Disabled Persons Act requires no showing  
15 of intent.

16 Finally, Hubbard apologizes for the length of her Opposition, but  
17 felt such a thorough analysis was needed in light of the importance of the  
18 underlying issues.

19 DATED: May 23, 2008                   **DISABLED ADVOCACY GROUP**

20  
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